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Public Prosecutor v Dato' Seri Anwar bin Ibrahim

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS W-09–71 OF 2009 AND W-09–74 OF 2009
HASAN LAH, ABU SAMAH AND SULAIMAN DAUD JJCA
21 DECEMBER 2009

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Criminal Procedure — Disclosure of information — Documents — Appeal against order to produce documents and materials — Whether respondent entitled to discover or inspect evidence or material in possession of prosecution before commencement of trial — Whether trial judge erred in failing to appreciate true object and/or misinterpreted s 51 of the Criminal Procedure Code — Whether

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trial judge erred in reading ss 51 and 51A conjunctively — Whether documents and exhibits requested provided for in ss 51 and 51A

Statutory Interpretation — Construction of statutes — Legislative intent — Hansard material — s 51A of the Criminal Procedure Code — Whether words

E

clear and unambiguous — Whether s 51A could be used to interpret s 51

Words and Phrases — 'Decision' — Meaning of — Courts of Judicature Act 1964

F

ss 3 & 50(1)

The prosecution was appealing against the whole order of the learned trial judge on allowing in most part, the respondent's application under s 51 of the

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Criminal Procedure Code ('CPC') to compel the production of documents, materials, property and items as particularised in the respondent's notice of motion dated 10 June 2009. The respondent had also appealed against part of the same order, by which the learned trial judge had refused his application for CCTV recordings at other locations within the Desa Damansara

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Condominium, the original samples and the s 112 statement of other witnesses not named by the respondent. The prosecution contended, inter alia, that the learned trial judge had erred in law in failing to appreciate the true object of s 51 of the CPC and had misinterpreted that section; the learned trial judge erred in law in reading conjunctively s 51 and s 51A of the

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CPC when deciding that the prosecution had to disclose all evidence which would be used against the respondent, before trial; that the learned trial judge erred in law in ordering disclosure of documents when: (i) the court had no such jurisdiction; (ii) the documents and exhibits requested by the respondent were not provided for in s 51 and s 51A of the CPC. On the other

hand, the respondent in his appeal contended that the documents and materials requested were important and imperative for the preparation of his defence. Without those documents and materials, the defence would be handicapped. The court had to consider, inter alia, whether cases relating to disclosure of information, documents and materials under s 51 were still relevant with the coming into force of s 51A. The respondent had also, at the outset of the hearing of this appeal, raised a preliminary objection that the order given by the learned trial judge was not appealable, therefore, the court had no jurisdiction to hear the appeal.

Held, allowing the prosecution's appeal in part and dismissing the respondent's appeal:

(1) The effect of the High Court's order was that the issue of the production of the documents and materials by the prosecution pursuant to s 51 of the CPC had been finally disposed of whereby the prosecution was ordered to supply the documents or materials to the respondent. The decision of the High Court had finally disposed of the respondent's notice of motion. As such, this would be the correct time for the prosecution to appeal against the High Court's decision (see para 14).

(2) Except as what is provided for under s 51A of the CPC the respondent was not entitled to discover or inspect evidence or material in the possession of the prosecution before the commencement of the trial (see para 40).

(3) The wording of s 51A is very clear in that what the prosecution is required to supply are those documents/statements of fact expressly stipulated therein. The decision of the apex court in *Public Prosecutor v Raymond Chia Kim Chwee & Anor; Zainal bin Hj All v Public Prosecutor* [1985] 2 MLJ 436 and *Husdi v Public Prosecutor* [1980] 2 MLJ 80 are relevant and applicable in respect of the application for documents not specifically mentioned in s 51A of the CPC. In this connection, the law on the application of s 51 had not changed notwithstanding the inclusion of the new s 51A of the CPC. The learned judge erred in law in not observing the judicial precedents with regard to the interpretation of s 51 of the Code in exercising his discretion (see paras 42, 47 & 49).

(4) The purpose intended by the Parliament in enacting s 51A as reflected in the *Hansard* and the Minister's speech when tabling the bill must be read in the context of s 51A only and could not be extended to s 51 as s 51 was already in existence. Section 51A provided for automatic disclosure. It has nothing to do with the court's discretion under s 51.

The court therefore could not read the Parliament's purpose of introducing s 51A into s 51 and the court could not indirectly rely on the reasons given for the inclusion of s 51A to interpret s 51. Sections 51 and 51A are two separate and distinct provisions as clearly spelt out from the wordings of the respective provision (see para 48).

[Bahasa Malaysia summary

Pihak pendakwaan merayu terhadap keseluruhan perintah hakim perbicaraan yang bijaksana kerana membenarkan sebahagian besar daripada permohonan responden di bawah s 51 Kanun Prosedur Jenayah ('KPJ') untuk membuat pendedahan dokumen-dokumen, bahan-bahan, harta-harta dan item-item yang diperincikan dalam notis usul responden bertarikh 10 Jun 2009. Responden juga telah merayu terhadap bahagian sama perintah itu, yang mana hakim perbicaraan yang bijaksana telah menolak permohonan mereka untuk rakaman CCTV di lokasi lain dalam Kondominium Desa Damansara, sampel-sampel asal dan penyataan s 112 saksi-saksi lain yang tidak dinamakan oleh responden. Pihak pendakwaan menegaskan, antara lain, bahawa hakim perbicaraan yang bijaksana telah terkhilaf dari segi undang-undang kerana gagal untuk menyedari tujuan sebenar s 5 KPJ dan telah salah tafsir seksyen tersebut; hakim perbicaraan yang bijaksana telah terkhilaf dari segi undang-undang kerana membaca s 51 dan s 51A KPJ secara berhubungan semasa memutuskan bahawa pendakwaan telah mengemukakan semua keterangan yang akan digunakan terhadap responden, sebelum perbicaraan; bahawa hakim perbicaraan yang bijaksana telah terkhilaf dari segi undang-undang kerana mengarahkan pendedahan dokumen-dokumen apabila: (i) mahkamah tiada bidang kuasa sedemikian; (ii) dokumen-dokumen dan ekshibit-ekshibit yang dipohon oleh responden tidak diperuntukkan dalam s 51 dan s 51A KPJ. Responden dalam rayuan mereka menegaskan bahawa dokumen-dokumen dan bahan-bahan yang dipohon adalah penting dan imperatif untuk persediaan pembelaan mereka. Tanpa dokumen-dokumen dan bahan-bahan tersebut, pembelaan itu akan cacat. Mahkamah perlu mengambilkira, antara lain, sama ada kes-kes yang berkaitan dengan pendedahan maklumat, dokumen-dokumen dan bahan-bahan di bawah s 51 masih relevan dengan penguatkuasaan s 51A. Responden juga telah, di awal perbicaraan rayuan ini, menimbulkan bantahan awal bahawa perintah yang diberikan oleh hakim perbicaraan yang bijaksana tidak boleh dirayu, oleh itu mahkamah tiada bidang kuasa untuk mendengar rayuan.

Diputuskan, membenarkan sebahagian rayuan pendakwaan dan menolak rayuan responden:

(1) Kesan perintah Mahkamah Tinggi adalah bahawa isu pendedahan

dokumen-dokumen dan bahan-bahan oleh pendakwaan menurut s 51 KPJ telahpun diselesaikan di mana pendakwaan diperintahkan untuk membekalkan dokumen-dokumen atau bahan-bahan itu kepada responden. Keputusan Mahkamah Tinggi telah mematahkan notis usul responden. Oleh itu, ini merupakan masa yang tepat untuk pendakwaan merayu terhadap keputusan Mahkamah Tinggi (lihat perenggan 14).

(2) Selain daripada apa yang diperuntukkan di bawah s 51A KPJ responden tidak berhak untuk mendapat atau memeriksa bukti atau bahan yang berada dalam milikan pendakwaan sebelum perbicaraan bermula (lihat perenggan 40).

(3) Susunan kata-kata dalam s 51A amat jelas bahawa apa yang perlu dibekalkan oleh pendakwaan adalah dokumen-dokumen/kenyataan-kenyataan fakta yang nyata ditetapkan dalam seksyen tersebut. Keputusan mahkamah tertinggi dalam *Public Prosecutor v Raymond Chia Kim Chwee & Anor; Zainal bin Hj All v Public Prosecutor* [1985] 2 MLJ 436 dan *Husdi v Public Prosecutor* [1980] 2 MLJ 80 tidak relevan dan terpakai berkaitan dengan permohonan untuk dokumen-dokumen yang tidak dinyatakan secara khusus dalam s 51A KPJ. Sehubungan itu, undang-undang tentang pemakaian s 51 masih tidak berubah meskipun dengan kemasukan s 51A KPJ yang baru. Hakim yang bijaksana terkhilaf dari segi undang-undang kerana tidak mematuhi kehakiman duluan berkaitan dengan pentafsiran s 51 KPJ dalam menggunakan budi bicara beliau (lihat perenggan 42, 47 & 49).

(4) Tujuan yang diniatkan oleh Parlimen dalam menggubal s 51A seperti yang digambarkan dalam Hansard dan ucapan Menteri semasa membentangkan rang undang-undang perlu dibaca dalam konteks s 51A sahaja dan tidak boleh diluaskan kepada s 51 kerana s 51 masih wujud. Seksyen 51A memperuntukkan pendedahan automatik. Tidak ada kaitan dengan budi bicara mahkamah di bawah s 51. Oleh itu mahkamah tidak boleh membaca tujuan Parlimen memperkenalkan s 51A ke dalam s 51 dan mahkamah tidak boleh secara tidak langsung bergantung kepada alasan-alasan yang diberikan untuk kemasukan s 51A untuk mentafsir s 51. Seksyen-seksyen 51 dan 51A merupakan dua peruntukan yang berasingan dan berbeza sepertimana yang dinyatakan dengan jelas daripada perkataan-perkataan peruntukan yang berkaitan (lihat perenggan 48).]

Notes

For cases on construction of statutes in general, see 11 *Mallal's Digest*, (4th Ed, 2005 Reissue) paras 1836–2049.

Cases referred to

Dato' Seri Anwar bin Ibrahim v PP [1999] 1 MLJ 321, CA (refd)
Haji Abdul Ghani bin Ishak v PP [1980] 2 MLJ 196, HC (refd)
Husdi v PP [1979] 2 MLJ 304, HC (refd)
Husdi v PP [1980] 2 MLJ 80, FC (folld)
Kulwant v PP [1986] 2 MLJ 10, HC (folld)
Letchumanan a/l Suppiah v PP & another appeal [2009] 5 MLJ 597, FC (refd)
PP v Raymond Chia Kim Chwee & Anor; Zainal bin Hj All v PP [1985] 2 MLJ 436, SC (folld)
PP v Teoh Choon Teck [1963] MLJ 34, HC (refd)
Retnarasa a/l Annarasa v PP [2008] 8 MLJ 608, HC (refd)
Saad bin Abas & Anor v PP [1999] 1 MLJ 129, CA (refd)
State of Orissa v Debendra Nath Padhi [2004] 4 LRI 860, SC (refd)
Syed Abu Bakar bin Ahmad v PP [1982] 2 MLJ 186, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 50(1)
Criminal Procedure Code ss 5, 51, 51A, 51A(1)(b), (c), 112, 307(1)
Criminal Procedure Code [IND] s 91
Criminal Procedure Code [SING] s 57
Dangerous Drugs Act 1952 ss 12(2), 39A
Penal Code ss 377B, 418, 467, 471

Appeal from: Criminal Application No MTJ3–44–99 of 2009 (High Court, Kuala Lumpur)

Mohd Yusof bin Zainal Abiden (Nordin bin Hassan and others with him) (Attorney General's Chambers) for the prosecution.
Karpal Singh (CV Prabakaran and others with him) (SN Nair & Partners) for the respondent.

Hasan Lah JCA:

INTRODUCTION

[1] This is an appeal by the public prosecutor against the whole order of the learned High Court judge ('the learned judge') on 16 July 2009, allowing in most part, the respondent's application under s 51 of the Criminal Procedure Code ('the Code') to compel the production of documents, materials, property and items as particularised in the respondent's notice of motion dated 10 June 2009 ('encl 2'). The public prosecutor's appeal is registered as Criminal Appeal No W-09–71 of 2009.

[2] The respondent had also filed an appeal against part of the same order, by which the learned judge did not allow the respondent's application for CCTV recordings at other locations within the Desa Damansara Condominium, the original samples and the s 112 statement of other witnesses not named by the respondent. The respondent's appeal is registered as Criminal Appeal No W-09–74 of 2009.

[3] On 6 November 2009 we allowed the appeal by the public prosecutor in part and dismissed the respondent's appeal. We now give the grounds of our decision.

BACKGROUND FACTS

[4] The respondent was charged in the sessions court on 7 August 2008 under s 377B of the Penal Code. He pleaded not guilty. On 5 March 2009, his case was transferred to the High Court on a certificate under s 418A of the Code signed by the public prosecutor.

[5] After he was charged in the sessions court the respondent had, through his solicitors, made numerous requests to the public prosecutor for documents and materials.

[6] Dissatisfied with the response and the refusal by the public prosecutor to provide the documents and materials requested, the respondent filed an application by way of notice of motion dated 10 June 2009 for an order to compel the public prosecutor and/or other persons having custody, care and/or control, to produce to the respondent the following documents, property, materials and items:

(a) the original CCTV recordings allegedly taken from the guardhouse and lifts to Block 11 of Desa Damansara Condominium and any other locations within the condominium fitted with CCTVs;

(b) DNA samples — the original samples, original swabs, slides made during testing, pictures of the slides and the 'electro pherogram' for each sample identified as 'B-B12', 'A-A7', 'D1-D3';

(c) the notes of the chemists who did the testing and analysis;

(d) the notes from all the doctors who examined the complainant Mohd Saiful Bukhari bin Azlan at Hospital Kuala Lumpur;

(e) the doctors' notes, photographs and report of the proctoscopy or other tests done on Saiful at Hospital Kuala Lumpur;

(f) the report from Hospital Pusrawi and doctor's notes on the examination done on Saiful;

(g) the video recording of statement by Saiful on 30 June 2008;

(h) witness statements under s 112 of the Code;

(i) copies of all documents and items which will be produced by the public prosecutor under s 51A(1)(b) of the Code;

(j) a statement of facts favouring the respondent under s 51A(1)(c) of the Code;

(k) all documents and items that will not be used by the prosecution in the trial;

(l) a list of the prosecution witnesses; and

(m) alternatively, the respondent prayed for an order that the public prosecutor disclose, and that the respondent be allowed to inspect, all the documents and items mentioned above.

[7] Since the application was filed the prosecution had provided the respondent with the following documents and material:

(a) a CD with a copy of the alleged CCTV recording only for 26 June 2008;

(b) copies of the 'electro pherogram' of the alleged DNA samples tested;

(c) notes of the doctor (as opposed to a report) from Pusrawi Hospital; and

(d) a clearer copy of the respondent's statement.

PRELIMINARY OBJECTION

[8] At the outset of the hearing of this appeal Mr Karpal Singh, learned counsel for the respondent, raised a preliminary objection. It was his contention that the appeal by the public prosecutor (and by the respondent) was incompetent on the ground that the order given by the learned judge was not appealable. This court had no jurisdiction to hear the appeal. According to Mr Karpal, the order of the learned judge was not a 'decision' within the meaning of s 50(1) of the Courts of Judicature Act 1964 read with the definition of 'decision' in s 3 of the same Act since the order did not finally dispose of the rights of the parties.

[9] In support of his contention, Mr Karpal cited the following cases:

(a) *Saad bin Abas & Anor v Public Prosecutor* [1999] 1 MLJ 129 (CA);

(b) *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [1999] 1 MLJ 321 (CA); and

(c) *Letchumanan a/l Suppiah v Public Prosecutor & another appeal* [2009] 5 MLJ 597.

[10] Under s 3 of the Courts of Judicature Act 1964, the word 'decision' is defined that 'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties. In *Saad bin Abas*'s case, the Court of Appeal held that the decision of the High Court in ordering the applicants to enter their defence was a ruling that did not have the effect of finally disposing of their rights. In *Dato' Seri Anwar bin Ibrahim*'s case the Court of Appeal held that it had no jurisdiction to entertain an appeal on the subject of bail.

[11] In *Letchumanan a/l Suppiah*'s case, the Court of Appeal ordered the respondent to enter his defence on a reduced charge of possession of drugs under s 12(2), punishable under s 39A of the Dangerous Drugs Act 1952. The public prosecutor appealed to the Federal Court against the decision and the respondent filed a cross-appeal against the decision in calling for his defence on the reduced charge of possession. The prosecution raised a preliminary objection against the cross-appeal by the respondent on the ground that he had no right of appeal as the decision of the Court of Appeal had not finally disposed of his rights yet. Similarly the respondent raised objection against the public prosecutor's appeal. Learned counsel for the respondent conceded that the respondent's appeal was not appealable because the matter had not finally disposed of the rights of the respondent. With regard to the public prosecutor's appeal the Federal Court held that the public prosecutor could appeal against the decision as the effect of the Court of Appeal's order was that the charge of trafficking had been finally disposed of by calling for the defence only for possession.

[12] In response the learned solicitor general, Dato' Yusof Zainal Abidin, submitted that the order of the learned judge had finally disposed of the public prosecutor's right with regard to the documents and the materials in dispute. That order determined the public prosecutor's right to refuse production of the documents and the materials to the defence.

[13] In *Public Prosecutor v Raymond Chia Kim Chwee & Anor; Zainal bin Hj All v Public Prosecutor* [1985] 2 MLJ 436, one of the issues for determination by the Supreme Court was whether an appeal lie to the High Court from an order made by a subordinate court under s 51 of the Code. The Supreme Court held that a decision or order to issue a summons under s 51 of the Code is a final order in the sense that it is final in its effect and therefore appealable under s 307(1) of the Code.

[14] With respect, we agree with the submission of the learned solicitor general. The effect of the High Court's order was that the issue of the production of the documents and materials by the public prosecutor pursuant to s 51 of the Code had been finally disposed of whereby the public prosecutor was ordered to supply the documents or materials to the respondent. The decision of the High Court had finally disposed of the respondent's notice of motion. As such this would be the correct time for the public prosecutor to appeal against the High Court's decision.

[15] For the reasons given above we dismissed the respondent's preliminary objection.

THE BASIS OF THE RESPONDENT'S APPLICATION

[16] The respondent made the application under ss 5, 51 and 51A of the Code. According to the respondent, the documents and materials requested for are important and imperative for the preparation of his defence. Without those documents and materials his defence would be handicapped. He had stated the main points of his defence at the first available opportunity, namely, alibi, credibility of the complainant, political conspiracy and tempering of evidence.

[17] Discovery provisions are found in ss 5, 51 and 51A of the Code. With the passing of s 51A of the Code, the respondent contended that there was now a new philosophy with regards to the disclosure and discovery procedure in criminal proceedings in Malaysia. This philosophy underscored the approach the court must take not only in the interpretation of s 51A but also ss 51 and 5 of the Code.

[18] According to learned counsel for the respondent, the respondent only needed to show that the documents or materials applied for fulfilled any one of those three provisions.

[19] The public prosecutor's grounds of appeal as set out in their petition of appeal can be summarised as follows:

(a) that the learned judge erred in law and fact in ordering the public prosecutor to produce the documents and materials to the respondent and/or allowing the respondent to view them;

(b) that the learned judge erred in law in failing to appreciate the true object of s 51 of the Code and misinterpreted the section;

(c) that the learned judge erred in law in reading conjunctively ss 51 and s 51A of the Code when deciding that the public prosecutor had to disclose all evidence which would be used against the respondent, before trial;

(d) that the learned judge erred in law in considering the *Hansard* when s 51A of the Code is clear and unambiguous and misconstrued the Minister's speech; and

(e) that the learned judge erred in law in ordering disclosure of documents when:

(i) the court has no such jurisdiction; and

(ii) the documents and exhibits requested by the respondent are not what is provided for in ss 51 and 51A of the Code.

[20] The respondent's grounds of appeal as set out in his petition of appeal are briefly as follows:

(a) that the learned judge erred in not ordering production of the original samples and swabs as applied for;

(b) that the learned judge erred in fact and in law in holding that the identity and the chain of evidence would be affected if production of the samples were allowed before being tendered as evidence in court;

(c) that the learned judge erred in fact and in law in not allowing the application for the production of the original samples and swabs;

(d) that the learned judge erred in not recognising the lacunae in the law and failing to apply s 5 of the Code and the UK law on disclosure in criminal trial;

(e) that the learned judge erred in not ordering the production of the CCTV's in other locations;

(f) that the learned judge erred in not ordering the disclosure of the s 112 witness statement of other witnesses not named by the respondent;

(g) that the learned judge erred in not allowing the inspection and discovery of the original samples, CCTV recordings at the other unnamed locations and witness statements of other unnamed witnesses; and

(h) that the learned judge erred in holding that the court had to accept the s 51A(1)(c) certificate issued by the public prosecutor without question.

SECTION 5

[21] Section 5 of the Code provides:

A As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force the law relating to criminal procedure for the time being in force in England shall be applied so far as the same shall not conflict or be inconsistent with this Code and can be made auxiliary thereto.

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[22] Learned counsel for the respondent submitted that despite the inclusion of s 51A in the Code there is still a lacunae as to the disclosure and inspection process in criminal trials in Malaysia. It was contended that s 51A is ambiguous in that it is not as comprehensive as the English provisions on C disclosure and many matters are unclear and open to debate as this case itself demonstrated. As such s 5 of the Code is applicable.

[23] In response to that the learned solicitor general submitted that s 5 is not applicable as there is no lacunae in law relating to the disclosure and D inspection process in criminal trials in Malaysia. Sections 51 and 51A of the Code are clear and unambiguous.

[24] It is to be noted that the learned judge did not rely on s 5 of the Code E or resort to the English law in making the order. As such it must be assumed the learned judge had rejected the contention by the respondent that s 5 was applicable to his application.

[25] The cases cited by learned counsel for the respondent to show that the F Malaysian court applied s 5 of the Criminal Procedure Code are not concerned with the application under s 51 (and 51A) of the Code. They are concerned with other matters. As such those cases, in our view, are of no assistance to the respondent in this application.

G **[26]** In *Kulwant v Public Prosecutor* [1986] 2 MLJ 10, the applicant made an application to the High Court under s 57 of the Singapore Criminal Procedure Code (which is in pari materia with our s 51) for a certified copy of his earlier statement to the police. It was submitted in that case that s 5 of the Singapore Criminal Code which makes English law relating to criminal H procedure applicable in matters for which no special provision has been made by the Singapore Code was applicable to the applicant's case. P Coomaraswamy J ruled that there was no lacunae in the Singapore Code making it necessary to resort to English law.

I **[27]** The most authoritative decision on s 51 of the Code is the decision of the Supreme Court in *Raymond Chia*'s case. In that case, the Supreme Court did not resort to s 5 of the Code in its judgment. In the other cases cited by the parties before us, s 5 was not considered by the Malaysian court in its judgment. This could only mean that s 5 is not applicable for the purpose of

the application under s 51 of the Code. Similarly in the instant case, we were of the view that s 5 of the Code was not applicable to the respondent's application as there was no lacunae in the Code on this issue making it necessary for us to resort to the English law.

SECTION 51

[28] For convenience, s 51 of the Code is reproduced which reads as follows:

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(1) Whenever any court or police officer making a police investigation considers that the production of any property or document is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before that court or officer, such court may issue a summons or such officer a written order to the person in whose possession or power such property or document is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce any property or document shall be deemed to have complied with the requisition if he causes the property or document to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed to affect the provisions of any law relating to evidence for the time being in force or to apply to any postal article, telegram or other document in the custody of the postal or telegraph authorities.

[29] As can be seen from that section, the court is given wide powers to order the production of documents and property necessary and desirable for the purposes of trial. Applications under s 51 can be made at any stage of the proceedings. The authorities have divided those applications into two categories, namely, (a) the pretrial; and (b) in the course of the trial or proceedings. The authorities have also decided that for each category of application different considerations must be given by court in deciding whether to order the production of documents or materials. In the instant case the learned judge made the order under this section.

[30] As stated earlier the most authoritative case on s 51 is *Raymond Chia*'s case. In that case the two respondents were charged in the sessions court with three others for the offence of forgery under ss 467 and 471 of the Penal Code. In the charge, they were alleged to have used dishonestly a letter of

credit for the amount of $2.4m with certain named documents. The two respondents applied for various documents in the possession of the prosecution including the five documents mentioned in the charge for their inspection. The learned president of the sessions court made an order in favour of the respondents confined to the inspection of (a) documents specifically referred to in the charge; and (b) documents removed by the prosecution from the respondents. On appeal, the High Court set aside the order of the learned president and the learned High Court judge, in exercise of his revisionary power, ordered that photostat copies of the five documents referred to in the charge be furnished to the respondents.

[31] The Supreme Court held that the order of the High Court for production of the documents was not a proper exercise of its revisionary powers. At pp 439–440 of the report, Hashim Yeop A Sani SCJ (as he then was) said:

> We were urged that the vital factor in this reference is the distinction drawn between what is labelled as the 'strict' approach taken by Seah J (as he then was) in *Syed Abu Bakar bin Ahmad* and the apparent 'liberal' approach envisaged in *Mallal's Criminal Procedure* where the author said that 'anything which may reasonably be regarded as forming part of the evidence in the case may be ordered to be produced and that is the primary object of these provisions' which approach would (it was urged) seem to have found favour with Hepworth J in *Public Prosecutor v Teoh Choon Teck* and Wan Yahya J in *Haji Abdul Ghani bin Ishak v Public Prosecutor*. We are of the view however that for practical purposes there is really no such distinction. From the language of the section ('necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding') it is quite plain that an application under that section may be made before the commencement of a trial or in the course of a trial. In exercising its discretion under s 51(1) of the Criminal Procedure Code the court has to consider the justice of the case and at what stage of the proceeding the application is made.
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> Where the court is asked to exercise its discretion under s 51 of the Criminal Procedure Code before the commencement of trial the court must have regard to the provisions of ss 152, 153 and 154 of the Criminal Procedure Code relating to the framing of the charge. There is clearly a specific duty imposed on the prosecution to particularise the charge sufficiently so as to give adequate notice to the accused person. The entitlement of the accused under s 51 of the Criminal Procedure Code to any document or copies of document or other material in the possession of the prosecution is entirely at the discretion of the court having regard to the justice of the case. The discretion should not however be exercised so as to enable the accused to gain access to materials before the trial as in the case of pretrial discovery and inspection of documents in a civil proceeding. The accused in a criminal trial should have sufficient notice of what is alleged against him so as to enable him to prepare his defence. So long as that requirement is satisfied the law is satisfied. The principle of justice was in fact emphasised by Hepworth J in *Public Prosecutor v Teoh Choon Teck* at p 35 where he said:

> If there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged, and be prepared to answer the charge as best he may.
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> The qualification, however, is also stated by the learned judge in the same page with which we respectfully agree:
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> It will be observed that nowhere do ss 162, 163 and 164 say that the accused person is entitled to know the means by which the prosecution proposes to prove the facts alleged in the charge.
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> Where the application under s 51(1) of the Criminal Procedure Code is made in the course of the trial, the rule of relevancy must be strictly enforced. We feel that this is what *Mallal's Criminal Procedure* meant by saying that 'anything which may reasonably be regarded as forming part of the evidence in the case may be ordered to be produced and that is the primary object of these provisions'.
>
> If the discretion is to be exercised before the commencement of trial the court cannot anticipate how the prosecution will proceed. In other words the court would not be justified to direct the prosecution to deliver to the accused all documents taken from him for that will not be a correct exercise of the discretion under s 51 of the Criminal Procedure Code. In the first place the accused should know what documents had been taken from him and to say that unless such documents were delivered for his inspection he would not be able to adequately prepare his defence cannot be a true proposition. A general demand for unspecified documents should likewise not be entertained. See *Anthony Gomez v Ketua Polis Daerah, Kuantan* and *Khoo Siew Bee & Anor v Ketua Polis Kuala Lumpur* for another basis for the inspection and supply of the first information report and cautioned statement. Under s 51 of the Criminal Procedure Code the accused is most certainly entitled to have copies of documents which are specified in the charge. But the accused cannot be expected to be given access to all documents whatsoever taken by the police during investigation. In respect of application made in the course of the trial the materials or documents asked for must be relevant to the issues for adjudication.

[32] In *Kulwant*'s case, the application was made before the commencement of the trial. P Coomaraswamy J in his judgment considered and analysed the decision of the Supreme Court in *Raymond Chia*'s case. At p 16 of the *Kulwant* case he said:

> In discussing the questions posed to the Supreme Court, regard must be had to the nature of the documents requested by the accused in that case. The charge was one of forgery and the charge specifically mentioned five documents. The Supreme Court said that attention must be paid to ss 152, 153 and 154 of the West Malaysian Criminal Procedure Code (ss 157, 158 and 159 in Singapore) relating to the framing of the charge. There is clearly a specific duty imposed on the prosecution to particularise the charge sufficiently so as to give adequate notice to the accused.

In this context, the Supreme Court did say that an application under s 51 can be made before the commencement of the trial but this view was qualified as appears hereafter. From the whole judgment, it is clear that an application before commencement of trial is only for the purpose of giving adequate particularity to the charge where the charge itself specifies documents.

To quote the Supreme Court, 'Where the application under s 51(1) of the CPC is made in the course of the trial, the rule of relevancy must be strictly enforced' at p 439/E. The Supreme Court went on to say:

If the discretion is to be exercised before the commencement of trial the court cannot anticipate how the prosecution will proceed. In other words the court would not be justified to direct the prosecution to deliver to the accused all documents taken from him for that will not be a correct exercise of the discretion under s 51 of the Criminal Procedure Code.

The Supreme Court of Malaysia was dealing with two categories of documents. One is documents referred to the charge. The second is other documents. In respect of the latter, both the Malaysian and the Indian Supreme Courts expressed the same view in different terms. The Malaysian court said that if a court is asked to exercise discretion 'before commencement of trial the court cannot anticipate how the prosecution will proceed'. The Indian Supreme Court quoted with approval the words of the magistrate. These words have already been quoted above. The views of these two Supreme Courts are my reasons and basis for saying that except in the case of documents referred to in the charge, an application under s 57(1) should be made only after the commencement of the recording of prosecution evidence.

[33] The *Raymond Chia* case and *Kulwant* case dealt with the application before the commencement of trial, which is similar to the instant case. Having carefully read and reread the decision in *Raymond Chia*'s case, we agree with P Coomaraswamy J's observation that except in the case of documents referred to in the charge an application under s 51 should be made only after the commencement of the trial.

[34] It must be noted that the Supreme Court in *Raymond Chia*'s case had considered the judgments of the High Court in *Syed Abu Bakar bin Ahmad v Public Prosecutor* [1982] 2 MLJ 186, *Public Prosecutor v Teoh Choon Teck* [1963] MLJ 34 and *Haji Abdul Ghani bin Ishak v Public Prosecutor* [1980] 2 MLJ 196. These three cases also concerned with the application under s 51 at the pretrial stage. In *Teoh Choon Teck*'s case, the accused was charged with forgery of a letter and a cheque. Hepworth J ordered the production of the letter and the cheque requested by the defence as these documents were specifically referred to in the charges and as it was essential for the accused to have the originals or photostat copies in order for him to properly prepare his defence.

[35] In *Haji Abdul Ghani bin Ishak*'s case, the accused was charged with the offence of corrupt practices. Wan Yahya J held that the accused was entitled to be supplied with copies of statements made by him as the accused had a tangible interest in them. The learned High Court judge also held that the accused was entitled to inspect the documents seized by BSN in connection with the trial.

[36] In *Syed Abu Bakar bin Ahmad*'s case, the accused applied for an order to inspect and make copies of all documents in the possession of the prosecution The accused contended that without a reasonable opportunity of studying these documentary materials he would not be able to prepare his defence adequately or give full and accurate instructions to his counsel in the conduct of his defence. Seah J dismissed the application. He was of the view that s 51 of the Code should be construed strictly. According to the learned High Court judge, s 51 does not allow an accused to ask for discovery of documents or inspection of documents seized by the police in the course of their investigation or in their possession before the criminal trial because to do so would be tantamount to inspection of the evidence of the prosecution by the defence prior to the trial.

[37] In *Husdi v Public Prosecutor* [1980] 2 MLJ 80, the Federal Court held that where the defence seeks to impeach the credit of a prosecution witness the defence can be supplied with a copy of the witness's statement to the police. In the High Court (*Husdi v Public Prosecutor* [1979] 2 MLJ 304) Syed Othman FJ dismissed the application and held at p 307:

> But I am of the view that once a police statement is held to be absolutely privileged for one judicial purpose, it is privileged for other purposes. There can be no right to inspect. Further, as a matter of public policy, I am of the view that it is undesirable for the prosecution to supply the defence with police statements, as there is a real danger of tampering with the witnesses.
>
> For the foregoing reasons, in the circumstances shown in the present application, the defence is not entitled to be supplied with police statements.

The Federal Court agreed with that where in his judgment Suffian LP said at p 83:

> Our conclusion is not inconsistent with judgment of Syed Othman FJ in *Husdi v Public Prosecutor* out of which arises this reference, which dealt with the wider question whether or not the defence is entitled in advance of the trial to copies of police statements of prosecution witnesses, and which he answered in the negative, which answer was not challenged before us.

[38] In *State of Orissa v Debendra Nath Padhi* [2004] 4 LRI 860, the Supreme Court of India made the following observation on s 91 of the Code of Criminal Procedure 1973 of India (which is similar to our s 51) in para 25 of its judgment:

> (25) Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is [*13] 'necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code. The first and foremost requirement of the section is about the document being *necessary or desirable*. The necessity or desirability would have to be seen with reference to the stage *when a prayer is made for the production*. If any document is necessary or desirable for the defence of the accused, the question of invoking s 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage.

In para 28 of its judgment, the court said:

> (28) We are of the view that jurisdiction under s 91 of the Code when invoked by accused the necessity and desirability would have to be seen by the court in the context of the purpose — investigation, inquiry, trial or other proceedings under the Code. It would also have to be borne in mind that law does not permit a roving or fishing inquiry.

[39] In *Sohoni's Code of Criminal Procedure*, 1973, (19th Ed), Vol 1 at p 388, it is stated that if the object of the inspection is merely to fish out for information, it is not a thing that could be permitted.

[40] As can be seen from the authorities mentioned above the exercise of this discretionary power by the court under s 51 of the Code with regard to the application at the pretrial stage has been limited. The court construed the section strictly. Except as what is provided for under s 51A of the Code the respondent is not entitled to discover or inspect evidence or material in the possession of the prosecution before the commencement of the trial. Based on the past decisions of the apex court we were of the view that the respondent was not entitled to get the order he prayed for in his notice of motion.

SECTION 51A

[41] Section 51A of the Code came into force on 6 March 2006. It provides for automatic discovery of certain documents by the accused before the commencement of the trial. Section 51A(1)(b) provides for the delivery to the accused of a copy of any document which would be tendered as part of the evidence for the prosecution. Section 51A(1)(c) requires the public prosecutor to deliver to the accused a written statement of facts favourable to the defence of the accused.

[42] We agree with the submission of the learned solicitor general that the wording of s 51A is very clear in that what the prosecution is required to supply are those documents/statements of fact expressly stipulated therein.

Whether cases relating to disclosure of information, documents and materials under s 51 are still relevant with the coming into force s 51A

[43] It is clear from the judgment of the learned judge that he disregarded the past authorities on disclosure of documents and information even though he had carefully considered those cases in his judgment. His reason for doing so can be found at pp 101 and 102 of the appeal record where the learned judge said:

> Meneliti peruntukan s 51A, dibaca bersama 51, saya berpendapat tujuan di sebalik dimasukkan s 51A walaupun ketika itu telah wujud s 51 adalah untuk memastikan proses pendakwaan lebih terbuka dan adil berbanding dengan sebelum adanya s 1A. Dengan ada s 51A ini telah mengubah proses pendakwaan sesuatu kes jenayah kepada lebih terbuka dan lebih adil mengikut keadaan sesuatu kes.

[44] In *Retnarasa a/l Annarasa v Public Prosecutor* [2008] 8 MLJ 608, the applicant, in the course of the inquest proceeding, made an oral application to the magistrate who was holding the inquest for post-mortem reports and other medical reports to be supplied. The magistrate refused and instead ordered that the reports be given to the applicant after the relevant medical witnesses had given evidence. The applicant filed a notice of motion to set aside the magistrate's order; and to be supplied with the relevant reports. Counsel subsequently narrowed his application for disclosure to the post-mortem report on the applicant's deceased wife.

[45] The High Court in that case varied the order of the magistrate and ordered the supply of the post-mortem report to the applicant forthwith. In his judgment, the High Court judge said at p 612:

> [11] With the coming into force the provisions in the new s 51A of the Criminal Procedure Code, cases relating to disclosure of information and documents, which were decided before this, ie before the implementation of the said pretrial discovery provisions, such as *Mohamed bin Musa v Deputy Public Prosecutor* [1972] 1 MLJ 49 and *Public Prosecutor v Raymond Chia Kim Chwee & Anor; Zainal bin Hj All v Public Prosecutor* [1985] 2 MLJ 436 will no longer be relevant.

[46] It is obvious from the judgment of the learned judge in the instant case that he was in agreement with the decision of the High Court in *Retnarasa*'s

A case. The learned judge disregarded the decisions of the apex court on the interpretation of s 51 of the Code. In fact this was the main complaint by the public prosecutor.

B **[47]** With due respect, we were unable to agree with the decision of the learned judge. In our view, the decision of the apex court in *Raymond Chia*'s case and *Husdi*'s case are relevant and applicable in respect of the application for documents not specifically mentioned in s 51A of the Code. In this connection we agree with the submission of the learned solicitor general that the law on the application of s 51 had not changed notwithstanding the C inclusion of the new s 51A of the Code.

[48] The purpose intended by the Parliament in enacting s 51A as reflected in the *Hansard* and the Minister's speech when tabling the bill must be read D in the context of s 51A only and could not be extended to s 51 as s 51 was already in existence. Section 51A provided for automatic disclosure. It has nothing to do with the court's discretion under s 51. In our view the court therefore cannot read the parliament's purpose of introducing s 51A into s 51 and the court cannot indirectly rely on the reasons given for the inclusion of E s 51A to interpret s 51. Sections 51 and 51A are two separate and distinct provisions as clearly spelt out from the wordings of the respective provision.

[49] For the reasons given above we are of the view that the learned judge F erred in law in not observing the judicial precedents with regard to the interpretation of s 51 of the Code in exercising his discretion. The High Court, like the Court of Appeal, is bound by all judgments of the apex court and it must apply the law as stated therein.

G **[50]** At this stage it is necessary to take a close look at the documents and the materials applied for by the respondent in his notice of motion and the order and reasons given by the learned judge in his decision in respect of the documents and the materials.

H *Paragraph 1.1 — Original CCTV*

[51] The learned judge ordered the public prosecutor to supply copies of the CCTV recording at Desa Damansara Condominium, Jalan Setia Kasih, Bukit Damansara from '00 hours' until '24 hours' starting from 25 June to I 27 June 2008, alleged to have been taken by CCTV at the following locations:

(a) the guardhouse of the condominium;

(b) lift C at Block 11 of the condominium; and

(c) passenger lift at Block 11 of the said condominium.

[52] The learned judge stated in his judgment that since the public prosecutor had given a CD with a copy of the CCTV recording on the 26 June 2008 there was no reason for the respondent not to be supplied with the recordings made on 25 and 27 June 2008. In making this order, the learned judge took into consideration the fact that the defence from the beginning had disclosed its defence of political conspiracy. According to the learned judge, these materials are important to the respondent for the preparation of his defence.

[53] Learned counsel for the respondent on the other hand submitted that the learned judge erred in not ordering the production of the CCTV in other locations or in not allowing the inspection and discovery of the original CCTV recordings at the other unnamed locations.

[54] Based on the decision of the Supreme Court in *Raymond Chia*'s case, we were of the view that the order granted by the learned judge in respect of the CCTVs before the commencement of the trial was outside the scope of s 51 of the Code. As such the order of the learned judge for the public prosecutor to produce the CCTVs was not a proper exercise of his discretionary powers. As stated in *Sohoni's Code of Criminal Procedure*, 1973, (19th Ed) at p 388, if the object of the inspection is merely to fish out for information, it is not a thing that could be permitted. With due respect to learned counsel for the respondent we were of the view that the object of the respondent's application for CCTV recordings allegedly taken from the guardhouse and lifts to Block 11 of Desa Damansara Condominium and any other locations within the condominium fitted with CCTVs from 25 June to 27 June 2008 was merely to fish out for information. The respondent was therefore not entitled to obtain the original CCTV recordings before the commencement of trial. In the circumstances the order of the learned judge in allowing the respondent's application in respect of the original CCTV recordings was set aside and the cross-appeal by the respondent was dismissed.

Paragraph 1.2 — DNA samples

[55] The learned judge did not allow the respondent's application for the production or inspection of the original samples and swabs as applied for under para 1.2(i) and (ii) of the notice of motion on the ground that since the samples were packed and sealed the identity and the chain of the evidence would be affected if production of the samples were allowed before they were tendered as evidence in court. The learned judge said that the defence may apply for the inspection of the samples after they were tendered as evidence in court.

[56] With regard to the slides during testing and the pictures of slides stated in para 1.2(iii) and (iv) of the notice of motion the learned judge ordered respondent's counsel be allowed to inspect them and the learned judge ordered that the pictures of those slides be supplied to the defence.

[57] Learned counsel for the respondent submitted that the learned judge erred in fact and in law in not allowing the application for the production of the original samples and swabs:

(a) when it would prejudice the respondent's right to a fair trial;

(b) when s 51A(1)(b) of the Code requires the public prosecutor to disclose to the accused all evidence they would be tendering at trial; and

(c) when he failed to take into account that the authenticity of the samples were doubtful and questionable because of tampering by the police.

[58] It was our view that the decision of the learned judge in respect of the original samples and swabs was correct in law as the respondent was not entitled at the pretrial stage to have the original samples and swabs. With respect to the learned judge's order relating to the slides and pictures we were of the view that the learned judge erred in law in making the order (see *Raymond Chia*'s case). Furthermore the respondent, in our view, should not be allowed to fish out for information (*Sohoni's Code of Criminal Procedure*, 1973).

[59] With regard to the respondent's contention that s 51A(1)(b) of the Code requires the public prosecutor to disclose to the accused all evidence they would be tendering our answer to that is that s 51A refers to documents only.

[60] We therefore set aside the order made by the learned judge in respect of the slides and pictures and affirmed his decision in respect of the original samples and swabs. The cross-appeal by the respondent under this heading was dismissed.

Paragraph 1.3 — Worksheet/case notes of the chemists who conducted the DNA testing and analysis

[61] The learned judge ordered the public prosecutor to supply the worksheet/case notes of the chemist made during the analysis and tests carried out in respect of the original samples and swabs to the respondent on the ground that it would speed up the trial of the case.

[62] With respect, the learned judge erred in making the order. The issue for determination was whether the learned judge had the jurisdiction to make such an order. The learned judge fell into error because he disregarded the decision of the apex court in *Raymond Chia*'s case. These documents also would not come under s 51A(1)(b) of the Code for the simple reason that the prosecution would not be tendering them in court as their evidence. It must be noted that if the respondent requires those documents for the purpose of cross-examining the chemists when they are giving evidence the application for the production of those documents can only be made after the commencement of the trial. The decision of the Supreme Court in *Raymond Chia*'s case is clear with regard to the application under s 51 of the Code before the commencement of the trial. The order of the learned judge under this heading was therefore set aside.

Paragraph 1.4 — Witness statements under s 112 of the Code

[63] The learned judge allowed the respondent's application for witness statement in respect of the persons named under para 1.4(a)–(f) but disallowed the respondent's application in respect of para 1.4(g) namely, other witnesses who have given statements under s 112. The learned judge said that since the prosecution had given a statement under s 51A(1)(c) to the defence to say that there was no statement of facts favourable to the defence of the respondent the defence should be given the opportunity to find out whether what was said by the prosecution was true or not. This could only be done by the defence if the defence was given access to the witnesses' statements. The learned judge was also of the view that there was nothing to suggest that the prosecution would be prejudiced or the public interest would be compromised if the witnesses statements were given to the defence. Furthermore, it would enable the respondent to know in advance the case against him.

[64] Learned counsel for the respondent submitted that the learned judge erred in not ordering the disclosure of the statement of other witnesses after he ruled that the respondent was entitled to statement of the witnesses under para 1.4(a)–(f).

[65] In respect of the learned judge's order for the production of the witnesses' statement, it was our decision that the learned judge had erred. As stated earlier and based on the decision in *Raymond Chia*'s case, the learned judge had no jurisdiction to make such order under s 51 of the Code before the commencement of the trial. Furthermore as stated by the Syed Othman FJ in *Husdi*'s case the statement made to the police in the course of a police investigation is a privileged document. Further, as a matter of public policy it is undesirable for the prosecution to supply the defence with the

police statements as these is real danger of tampering with witnesses. The witness statement could only be supplied to the defence in a situation stated by the Federal court in *Husdi*'s case. Furthermore, we were of the view that what the defence was doing here was merely to fish out for information. A general demand for the witnesses' statement should not be entertained.

[66] With regard to the learned judge's observation that the defence be supplied with the witnesses' statement so that the defence could find out whether what was said by the prosecution pursuant to s 51A(1)(c) was right or not we were of the view that the issue could only be determined by the court after the commencement of the trial and after the relevant witnesses have given evidence in court. The court could not anticipate how the prosecution would prove its case.

[67] For the reason stated above we set aside the order of the learned judge under this heading and dismissed the cross-appeal by the respondent.

OTHER DOCUMENTS

[68] In his decision the learned judge also ordered the prosecution to supply the witness list to the defence. We were also of the view the order was wrong based on the reason given above for the setting aside of the learned judge's order in respect of the witness statement. The order was therefore set aside.

[69] The learned judge also in his judgment ordered the prosecution to supply the following documents:

(a) case/examination notes of the doctors at Hospital Kuala Lumpur who treated and examined Mohd Saiful Bukhari bin Azlan including on 28 June 2008 (para 1.8);

(b) photograph, case/examination notes of the doctors and report of the proctoscopy or other examinations conducted on Mohd Saiful Bukhari bin Azlan at Hospital Kuala Lumpur including 28 June 2008 (para 1.9);

(c) all the unused documents (para 1.12); and

(d) examination notes and medical report on Mohd Saiful Bukhari bin Azlan from Hospital Pusrawi (para 1.11).

[70] It was our decision that the learned judge erred in law in ordering the production of the documents mentioned in para [69] above based on the reasons given above. We therefore set aside the learned judge's order in respect of the documents under para [69] above. For the avoidance of doubt, our

order was made without prejudice to the respondent's right to be supplied with documents under s 51A(1)(b) of the Code.

[71] In his judgment also the learned judge ordered the prosecution to supply the following:

(a) copies of all documents pursuant to s 51A(1)(b) of the Code; and

(b) statement of facts favourable to the defence of the respondent pursuant to s 51A(1)(c) of the Code.

[72] It is clear that under s 51A(1)(b) and (c) of the Code the respondent was entitled to those documents. As such the learned judge was right in making the order for the production of those documents. We therefore affirmed the learned judge's orders in respect of those documents. Since the statement under s 51A(1)(c) of the Code had been supplied by the prosecution to the defence we were therefore of the view that this matter was no longer an issue before us.

[73] For the reasons given above, we also dismissed the respondent's cross-appeal under paras 2 and 3 of his notice of appeal dated 21 July 2009.

CONCLUSION

[74] The appeal by the public prosecutor was therefore allowed in part and the cross-appeal by the respondent was dismissed.

Appeal allowed in part; cross-appeal by respondent dismissed.

Reported by Ashgar Ali Ali Mohamed